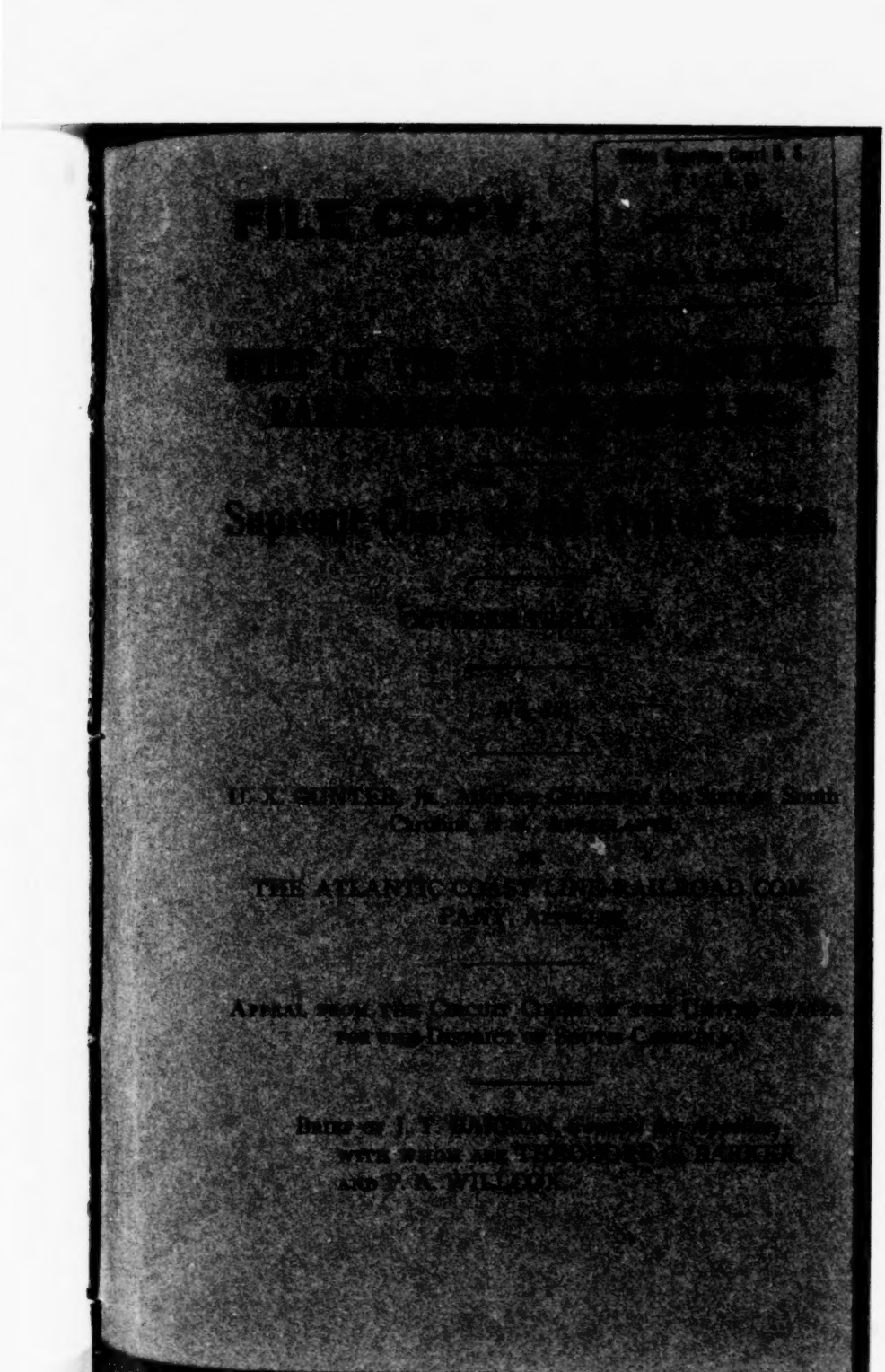


Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 88.

U. X. GUNTER, JR., Attorney General of the State of South Carolina, *et al.*, APPELLANTS,

vs.

THE ATLANTIC COAST LINE RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

BRIEF OF J. T. BARRON, *Counsel for Appellee,* WITH WHOM ARE THEODORE G. BARKER AND P. A. WILLCOX.

STATEMENT OF THE CASE.

This is an application to the Circuit Court of the United States for the District of South Carolina, in Equity, on the part of The Atlantic Coast Line Railroad Company of Virginia, operating, in consolidation with others, under the name of "The Atlantic Coast Line Railroad Company"—successor in ownership and interest to the Cheraw and Darlington Railroad Company of South Carolina.

It asks the Circuit Court to execute the Decrees of said Circuit Court of August 17, A. D. 1870, and of 27 April, A. D. 1871, in the suit of *Pegues* vs. *Humphreys et al.*, which were rendered against the tax officials of the Counties of Chesterfield and Darlington, which Counties then embraced the territory, now forming the Counties of Chesterfield, Darlington and Florence, in the State of South Carolina.

The Decree of the Circuit Court of April, 1871 (Transcript, fols. 62 and 70), had perpetually enjoined the tax officials of the Counties of Chesterfield and Darlington from enforcing process for the collection of any tax or assessment against the Cheraw and Darlington Railroad Company in the respective Counties, and, on appeal, was affirmed by the Supreme Court of the United States, in the case of *"Humphreys* vs. *Pegues," March 10, 1873*, and ordered to be executed (see *Mandate*), (Transcript, fols. 71 to 77).

The decision of the Supreme Court in 1873 had declared, that, by its charter, the property of the Cheraw and Darlington Railroad Company in South Carolina is perpetually exempt from taxation by the State of South Carolina (*Humphreys* vs. *Pegues, 16 Wallace, 244*).

From the year 1873, to the present time, no occasion or necessity for the enforcement of said Decrees, by active process, has arisen, the State of South Carolina, and her tax officials having, for more than thirty years, respected the judgment of this Court, and refrained from placing the said property on the tax books for taxation. (Transcript, folios 46 and 78.)

In the year 1898, The Cheraw and Darlington Railroad Company of South Carolina, under the provisions of the Act of Assembly, December, 1897 (22 Statutes of So. Ca., 653), was consolidated into the Atlantic Coast Line Railroad Company of South Carolina, which latter became the purchaser and legal owner of the Cheraw and Darlington Railroad in South Carolina, extending from Florence, in the County of Florence (formerly a part of Darlington County), to Cheraw, in the County of Chesterfield, in said State; and had become the

owner of all the other property and assets, which were of the Cheraw and Darlington Railroad Company, remaining in its possession on 18th July, 1898, of the stock of that Company, and of all the rights, privileges and franchises to which said Cheraw and Darlington Railroad Company had been and was then entitled.

By a compact made in 1897 with the State of South Carolina, in consideration of the grant of its charter, the Atlantic Coast Line Railroad Company of South Carolina surrendered to the State, in 1898, the exemption from taxation of its property theretofore held and enjoyed by the Cheraw and Darlington Railroad Company; the State accepted the surrender, and the taxes on said property have been regularly assessed and paid since the date of said surrender.

In the year 1900, the Atlantic Coast Line Railroad Company of Virginia purchased from the Atlantic Coast Line Railroad Company of South Carolina the stock and property which had formerly been of the Cheraw and Darlington Railroad Company, with its franchises, rights and privileges, went into possession thereof, under the name of the "Atlantic Coast Line Railroad Company," and is the legal successor of that corporation in ownership, possession, and interest. It has been so regarded and dealt with by the tax officers of the State, and is so treated in the appellants' suit, which has been enjoined by these proceedings. (Transcript, fol. 30, fol. 47, fol. 87, fol. 88.) It is the Petitioner in this cause. (Transcript, folios 10 to 17.)

On the 19th February, 1900, an Act of the General Assembly of the State of South Carolina was approved, entitled *"An Act to provide for the assessment for taxation of railroad property, which has been off the tax books, for the years in which they have been off the books, and to fix the time when such taxes shall become due and for the collection thereof."*

Under the provisions of that Act, which is quoted at length in the Petition (Transcript, folios 12-13), it is required:

Sec. 1. *"That when railroad property has not been returned nor assessed for any year and no taxes were paid thereon and more than a year has elapsed since such taxes, for such years, if assessed at the proper time, would have been due, the said taxes shall be assessed by the Railroad Board of Assessors, which shall be convened in extra session by the Secretary of State for said purposes, upon the petition of any County Supervisor in whose County any part of said railway may lie."*

Section 2 requires such board to *"fix the value of said road for each year that said road has been off the books separately,"*

and *"its valuation with the number of miles in each County shall be certified to the respective County Auditors, as the valuation of railroad property is done when regularly returned and assessed."*

Section 3 requires "that the said Auditor shall enter the said assessment each year separately, on the tax books in his office for the respective years and charge the taxes on said assessments, under the levies for those years, as if they had been assessed and levied at the usual time; and he shall furnish a certified statement to the County Treasurer, showing the property taxed, the value of the same, and the amount due for each year separately."

Section 4. *"That the Treasurer shall immediately demand the said taxes of the Company in default, or, if he find the property in possession of another Company, demand shall be made of the Company which he finds in possession of the property."*

Section 5 declares, *"That said taxes shall become due as soon as said demand is made, and, if they are not paid within sixty days from the demands made, there may be an action brought in the name of the State by the Attorney General and such counsel as the Counties interested may employ, against the Company in default, and any Company which may be in possession of the property which has escaped taxation, for the recovery of said taxes; and suit may be brought for each year separately, or for all the years consolidated."*

Section 6 limits *"The assessment herein provided for"* to 10 years, and declares *"that no recovery shall be had for a longer period than 10 years."*

Section 7 declares that *"the provisions of this Act shall not apply to any railroad property which may be hereafter adjudged by the courts to be exempt by law from the taxes which may be assessed against it under this Act."*

Section 8 declares *"That nothing herein contained shall be construed to impair the right of the State or any of its officers or agencies to collect such taxes in any other method provided by law."* (The other methods "provided by law" are distress warrant, levy, execution, and sale, *Civil Code of South Carolina*, Vol. I., p. 185.) The Act was approved the 19th day of February, A. D. 1900 (Transcript, fol. 14).

In May following, E. T. King, County Supervisor of Chesterfield County, petitioned the Secretary of State of South Carolina to convene the Railroad Board of Assessors in extra session pursuant to said Act to assess taxes on the Cheraw and Dalington Railroad, lying partly in Chesterfield and "the balance in Darlington and Florence Counties" for ten years prior

to 1899, alleging *"that prior to 1899 for more than thirty years the said road was left off the tax books and paid no State and County taxes"* (*Transcript, fol. 78*).

Thereupon, the said "Board of Railroad Assessors" convened in Columbia, S. C., for the purpose of assessing taxes on said road. Notice thereof had been given by the Secretary of State to this appellee, "The Atlantic Coast Line Railroad Company," which appeared before the Board by its counsel, who then and there objected to the juisdiction of said Board and exhibited and read to the Board certified copies of the decrees of injunction in the case of *"Pegues* vs. *Humphreys"* and *"Humphreys* vs. *Pegues,"* above set forth, and, protesting against the proceeding of the Board, filed a written objection thereto styled "Plea of the Atlantic Coast Line Railroad Company" (*Transcript, folio 47, fols. 80 to 86, and fol. 87*).

The Board of Railroad Assessors disregarded said protest and plea, and the decrees of the Circuit and of the Supreme Court of the United States, and proceeded, at the instance of W. F. Stevenson, claiming to be "Attorney for Counties Interested," to "assess" the Cheraw and Darlington Railroad for "taxes" (*Transcript, fol. 78*), and certified their "assessment" to the County Auditors of Chesterfield, Darlington, and Florence Counties, respectively. This "assessment" was, in the year 1900, entered by said Auditors in the tax books of their respective offices for each year separately, for ten years previous to 1899, that is, from the fiscal year beginning November 1, 1888, and the "taxes" were charged, as is claimed, under the general levies upon taxable property of the "State," which had been directed, for each of said years, by the supply bills of the General Assembly, sitting in each of said years (Transcript, fol. 88), and it is claimed by Appellants, that each of the sums *"so assessed became a just charge upon said property as soon as the assessment was made and the levy entered pursuant to the same"* (*Transcript, fol. 88*). Thereafter, on the 10th day of November, 1900, the Treasurer of said County demanded of the Agent of the Atlantic Coast Line Railroad Company, which company was then and still is in possession of the property, formerly owned by the Cheraw and Darlington Railroad Company, having acquired the same by consolidation with said Cheraw and Darlington Railroad Company, payment of said taxes," which payment was refused (*Transcript, fol. 88*).

Thereupon, "after the expiration of sixty days from the demands" so made, and in the year 1901, an action was brought in the Court of Common Pleas, of the State of South Carolina, for the County of Chesterfield, in the name of the State as

plaintiff, by the Attorney General thereof, and such counsel as the Counties interested employed, against *"The Cheraw and Darlington Railroad Company and The Atlantic Coast Line Railroad Company, defendants,"* upon ten separate causes of action, each, for the sum alleged to have been so "charged" for each of said ten years preceding the year 1899 (*Transcript, fol. 87-88*).

Similar actions were brought in Darlington and Florence Counties, these actions, in the whole, being upon thirty separate causes of action—ten years "taxes" for each of the above named three Counties—the sums so demanded for "taxes," so alleged to be "in default," aggregating the sum of *twenty-nine thousand eight hundred and seventy-seven & 57-100 dollars* ($29,877 57-100).

On the 2d day of October, 1901, The Atlantic Coast Line Railroad Company filed in the Circuit Court of the United States for the District of South Carolina, its Petition against G. Duncan Bellinger, Attorney General of the State of South Carolina; Stevenson and Matheson; S. W. G. Shipp; I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina. All of said persons except the Atlantic Coast Line Railroad Company being citizens of the State of South Carolina.

Said Petition was filed in the cause and entitled *"In re,* Thomas E. B. Pegues, a citizen of Mississippi, Complainant.

vs.

R. J. Humphreys, a citizen of South Carolina, County Treasurer for Darlington County, John McCalla, a citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company.

Ex parte The Atlantic Coast Line Railroad Company, a citizen of Virginia.

vs.

G. Duncan Bellinger, Attorney General of the State of South Carolina; Stevenson and Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Darlington County, South Carolina; J. O. McLendon, County Treasurer for Florence County, South Carolina. All said persons except the Atlantic Coast Line Railroad Company, being citizens of the State of South Carolina."

The title of the case has been changed on this Appeal by the

substitution of the name of U. X. Gunter, Jr., as Attorney General for that of G. Duncan Bellinger, retired, and appears as on the Transcript (fols. 123, 127, 130).

The Petition of the Atlantic Coast Line Railroad Company Transcript, fols. 10 to 17), prayed, "that, as the successor in ownership and interest of the Cheraw and Darlington Railroad Company, it may be allowed the benefit and protection of the said Decrees of the Circuit Court and of the Supreme Court, and due process to enforce obedience to the Decrees of the Circuit Court of 1871 and 1872 against the above named County Treasurers, as the present tax officials of the State, and against the said G. Duncan Bellinger, Attorney General, and the said Stevenson and Matheson, J. M. Spears and S. W. G. Shipp, plaintiffs' attorneys, requiring each of them to answer the petition, and that it may have a writ of Injunction issued from the Circuit Court, restraining the said officials, and also the said Attorney General and the said Stevenson and Matheson, J. M. Spears and S. W. G. Shipp, as plaintiffs' attorneys, from proceeding, under color of said Act of Assembly, and from prosecuting an action in the name of the State against The Cheraw and Darlington Railroad Company, and the petitioner, The Atlantic Coast Line Railroad Company, for the recovery of said amounts claimed as "taxes," and against each of the above named County Treasurers, enjoining and restraining them, and each of them, and any and all other persons, acting for or in the name of said State, from collecting all such amounts so claimed, and any other amounts, which may be claimed as taxes, in any method provided by law for the collection of taxes legally imposed" (*Transcript, fol. 16*).

A temporary injunction and rule to show cause was granted by the Circuit Judge in accordance with the prayer of the Petition, on the 2d October, 1901. (*Transcript, fol. 18.*) Returns to the Rule were filed by the respondents, W. H. Lawrence, as the Treasurer of Darlington County, by I. P. Mangum, as the Treasurer of Chesterfield County, by J. O. McLendon, as the Treasurer for Florence County, and by G. Duncan Bellinger, Attorney General, and by Stevenson and Matheson, J. M. Spears and S. W. G. Shipp, defendants' attorneys, showing cause and answering the Petition. (Transcript, fols. 21 to 34.)

Thereafter, on 18th and 19th November, 1901, the case was heard before his Honor, Nathan Goff, U. S. Circuit Judge, at Richmond, Va., "upon the petition and certified records of the Circuit Court for the Fourth Circuit, District South Carolina, and upon the return, answer and plea of respondents, and upon

affidavits and copies of the reports of Attorney Generals of South Carolina, and proceedings of the General Assembly of said State" (*Transcript, fol. 106*).

Thereafter, on the 16th January, 1903, his Honor, Nathan Goff, Circuit Judge, signed a Decree, which was entered in the Circuit Court, 16 January, 1903, in which "*the Court finds, that the questions, whether the property of the Cheraw and Darlington Railroad Company in South Carolina is entitled to exemption from taxation by the State of South Carolina by virtue of the grant contained in its amended charter, and whether the State would impair the obligation of its said contract by taxing said property, were finally determined by the Supreme Court of the United States on appeal in the cause, entitled 'Humphreys, tax collector, etc., et al., against Pegues,' reported in 16 Wallace, U. S. Rep., 244, and that the issues therein determined are res judicata and cannot be revived, or the decision questioned in any other proceeding. That if there was to be any modification, or reversal, of the result heretofore reached, it could only be made by the said Supreme Court.*

"*Also, that the injunction ordered in said cause on the 17th day of August, A. D. 1870, by the Circuit Court of the Fourth Circuit for the District of South Carolina against the tax officials of said State, is binding upon the Attorney General of said State and its tax officials of the present day, their predecessors and successors in office, and for all time and upon all persons claiming to exercise or enforce the taxing power of the State of South Carolina against the property of the Cheraw and Darlington Railroad Company; it is, therefore,*

"*Ordered, adjudged and decreed, that the rule issued in the case be, and the same is hereby, made absolute, and that respondents, G. Duncan Bellinger, Attorney General for the State of South Carolina; W. F. Stevenson, D. S. Matheson, Stevenson and Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; J. O. McLendon, County Treasurer for Florence County, South Carolina, and all other persons whosoever, claiming or to claim to represent the State of South Carolina, or the taxing power thereof, are hereby enjoined and prohibited from proceeding in the action begun in the name of said State by G. Duncan Bellinger, as Attorney General thereof, and his associates, the respondents above named, and from prosecuting any other action or proceeding whatsoever, or any distraint of property for the collection of money from the Petitioner, The Atlantic Coast Line Railroad Company, or its successors or*

assigns, upon the claim of taxes alleged to be due to the said State prior to the year 1899 by the said Company or by the Cheraw and Darlington Railroad Company in said State, or upon the claim of taxation prior to the year 1899, imposed by said State upon said property in the possession and ownership of the Cheraw and Darlington Railroad Company or in the control or possession of the Atlantic Coast Line Railroad Company." (*Transcript, fols. 106 to 109.*)

On 31 July, 1903, the following supplementary decree was signed by the Circuit Judge, and filed 8 August, 1903, to wit:

"Attention of this Court having been called to an interpretation put upon the decree of January 16, 1903, in above cause by respondents' counsel, in their Assignments of Errors, for appeal, viz: that the decree enjoins suit by the respondents for the portion of the taxes for the year 1898, accruing after the eighteenth day of July, 1898—the date when the claim for the exemption from taxation upon the property which was of the Cheraw and Darlington Railroad Company ceased—it is

"Ordered and decreed, that the words in the order for injunction, viz: 'year 1899,' occurring after the words 'prior to the' be erased and the words 'eighteenth day of July, 1898,' be inserted in lieu thereof; it is further ordered, that nothing in said decree contained shall be understood to enjoin the respondents or the taxing officers of the State of South Carolina from collecting by suit or otherwise any sum or sums of money, which may be due or charged for taxes after said eighteenth day of July, 1898, at which date it is admitted in argument, the exemption established in 'Pegues vs. Humphreys' was surrendered.

"(Signed) NATHAN GOFF,
"U. S. Circuit Judge."

(*Transcript, fol. 110.*)

This supplemental Decree of the Circuit Judge disposes of alleged errors in the Circuit Decree of January 16, 1903, charged in Appellants' *First* and *Second* Assignment of Errors.

ARGUMENT FOR APPELLEE.

Should the contention of Appellants in this case be sustained, it would become a question of vital concern to the public to know, whether this Court and the Circuit Courts of the United States have the power of protecting their Decrees, solemnly rendered, and acquiesced in for over thirty years, from contemptuous disregard by individuals, or State; and whether a conclusion, deliberately reached in 1873 by this Court, and proclaimed in its judgment, that certain property of a citizen is

APPELLANTS' FIRST ASSIGNMENT OF ERROR.

Transcript, folio 114.

"I. *His Honor, the Circuit Judge, having found that taxes for a part of the period embraced in the suit, to wit: from January 18, 1898, to December 31, 1898, were due and chargeable against the property of the Cheraw and Darlington Railroad Company, now owned by the petitioner, and were not stayed or affected by the original decree in Pegues vs. Humphreys, erred in granting any order restraining the prosecution of the action in the case of The State of South Carolina vs. The Atlantic Coast Line Railway Company, the principle being, that where any portion of the tax sued for is due, the Court of Equity will not restrain an action at law for the recovery of the same.*"

APPELLANTS' SECOND ASSIGNMENT OF ERROR.

Transcript, folio 115.

"II. *That under the admissions and proof before the Circuit Judge, under any view of the case, taxes were due from July 18th, 1898, to December 31st, 1898, and embraced in the said action which was enjoined, and the said Judge erred in restraining the State Attorneys when it appeared that anything was due, the principle being that a Court of Equity will not restrain suit if anything is due, unless it has been tendered.*"

The Circuit Judge has not found that taxes for any period were due and chargeable against the property. The record shows no such finding, as is alleged in Appellants' First Assignment of Error. There were no admissions or proof before the Circuit Judge that taxes were due from July 18, 1898, to December 31, 1898, or that such taxes were embraced in said action, nor did it appear that anything was due, as alleged in Appellants' Second Assignment, and the principle invoked in the assignments has no application in this case. Moreover, the Circuit Judge, in his Supplementary Decree, has judicially declared that he has not enjoined the collection of any taxes which may have become due after 18 July, 1898. (Transcript, folio 110, p. 68.)

exempt by law from all taxation by a State, is at the mercy, ever afterward, of experimental and unconstitutional legislation, or of professional persecution, and that such judgment may be set at naught, by disobedience of the positive injunction of the Courts, or by collateral attack, in another suit, no direct proceeding having been ever taken to obtain the reversal or modification of such Decrees.

APPELLANTS' THIRD ASSIGNMENT OF ERROR.

"III. *The Circuit Judge erred in holding that the case of Pegues vs. Humphreys and others was against all the tax officials of the State, when the record shows that it was only against the Treasurer of Darlington and Chesterfield Counties.*" (Transcript, fol. 115.)

It is admitted, that the case of *Pegues* vs. *Humphreys and others* was brought against the then Treasurers of Darlington and Chesterfield Counties, but we maintain, that it was a suit, which asserted the right of *The Cheraw and Darlington Railroad Company* to possess its property, exempt from the right and power of the State of South Carolina to impose taxes, State or County, upon it; that the State of South Carolina having entrusted the execution of its taxing power to certain officials, such officials, in such execution, necessarily stood for the State, and represented her whole personality in the assertion of her claim of right to tax the property threatened; that the case in 1870, in no possible sense, involved the individuality of R. I. Humphreys, who, at that day, happened to be the Treasurer of Darlington County, or of John McCalla, who happened to be the Treasurer of Chesterfield County; that it dealt with them wholly in their official relation, as "the tax officials of the State," representing the State in executing her taxing power, in asserting her right to tax the property in question and in defending the suit, in which the exemption was claimed on the one side, and denied on behalf of the State on theother. So that, if his Honor, the Circuit Judge, has said, that the case was "against the tax officials of the State," he was absolutely correct. If he had gone further and said, that the case was against the State herself, he would have been practically accurate. In no other way than by a suit to enjoin the execution of her taxing power by her official agents, could the issue as to her rightful claim to tax the property over against the rightful claim of its then owner (that its property was, under the State's contract, exempt from all taxation) have been judicially raised or determined. It was then very far from being a case "*only against*

the Treasurers of Darlington and Chesterfield Counties," as said in the appellants' third assignment.

We do not find anywhere in the Decree of the Circuit Judge, that he has said, "that the case of *Pegues* vs. *Humphreys and others* was against all the tax officials of the State" (as he is quoted to have said). What we do find him to have said, is this:

*"That the injunction ordered in said cause on the 19th day of August, A. D. 1870, by the Circuit Court of the Fourth Circuit for the District of South Carolina, against the tax officials of said State, which was on the 27th April, A. D. 1871, made perpetual, and as such, was affirmed by the Supreme Court of the United States on the 10th day of March, A. D. 1873, is binding upon the Attorney General of said State and its tax officials of the present day, their predecessors and successors in office, and for all time and upon all persons, claiming to exercise or enforce the taxing power of the State of South Carolina against the property of said Cheraw and Darlington Railroad Company; * * *"* (*Transcript, fol. 107*).

Can the case of *Humphreys* vs. *Pegues* be held to be otherwise than so binding? If it does not bind the State, in that it declares, in a suit in which the State was represented, that said property is, by her contract with the company, exempt from all taxation by her, and if binding the State, it does not bind all her tax officials and representatives, whom does it bind? Did it only bind personally R. I. Humphreys, who is dead, and John McCalla, who is dead? If R. I. Humphreys, "Tax Collector of Darlington County," against whom by name the injunction was directed, had died or resigned his office the next day after the Decree for Injunction of the Circuit Court was affirmed by this Court, and if a successor had been appointed, will it be said that the injunction would not have bound such successor? If it bound his immediate successor, it must have been because it had bound *Humphreys, ex officio*, as representing the State by virtue of his office, and so would it have bound all successors of Humphreys, and all other tax officials or representatives of the State in the exercising of her taxing power.

In accordance with the theory, that the case of *Pegues* vs. *Humphrey* was, virtually or practically, a suit against the State, the then Attorney General of the State came to Court as counsel for the tax officials, defendant, to defend the claim of the State to tax the property, contending, in their answer signed by him as "Attorney General of the State of South Carolina," that the charter, declaring the property exempt, was not a contract, which bound the State. By submitting the right of the State

to the judgment of the Court, the decision of the Court became binding on the State, and on all the tax officials and all persons representing her. (Transcript, fols. 63 to 66.)

APPELLANTS' FOURTH ASSIGNMENT OF ERROR.

"IV. *The Circuit Judge erred in holding that the judgment of the Court restraining the County Treasurer from proceeding to collect the taxes was binding on the State of South Carolina, whereas he should have held that a State is never bound by a judgment against its agents or officials, and can only be bound by the judgment of a Court in a cause where it consents to submit its rights, and such consent can only be given by the Legislature, and the Court had no power under the Constitution of the United States to bind the State directly or indirectly.*" (Transcript, fol. 115.)

Such was not the law in South Carolina in 1870-1871 and 1872, when the suit of *Pegues* vs. *Humphreys* was conducted on the part of the State of South Carolina by D. H. Chamberlain, her then Attorney General, or in 1873, when the decision of the Court was rendered in *Humphreys* vs. *Pegues,* and is not the law now.

At that date, August 6, 1870, when Pegues filed his Bill in the Circuit Court of the United States, the Act of Assembly of September, 1868, was in force, entitled an "*Act to fix the salary and define the duties of the Attorney General of the State,*" and Section 4 of said Act declared, that * * * "*when, in his judgment, the interest of the State requires, he shall be present at the trial of any cause in which the State is a party or interested* * * *" Also, there was then in force the Act of Assembly, approved February 28th, 1875, amending the Tax Laws of the State (*Statutes at Large of South Carolina, Vol. 14, p. 367*), of which Section 8 declared, "*It shall be the duty of the Attorney General of the State to defend any suit or proceeding against any Tax Collector or other officer, who shall be sued for moneys collected, or property levied on or sold on account of any tax* * * *." In the case of "*The State of South Carolina vs. Corbin & Stone, 16 So. Ca. Rep., 537,*" where the authority of the Attorney General to appear for and represent the State, without a previous special Act so authorizing or directing him, was called in question, his authority was upheld, the Court of last resort in South Carolina holding as follows:

"*But in addition to this, the Attorney General is especially required to defend the rights of the State in all cases where its rights are involved—General Statutes, 110 S. 35—* * *.*

But still, in addition, Attorney General Conner reported this action to the General Assembly; the same report was made by Attorney General Youmans after he took charge of the case. Even then, if legislative authority was required, the failure of the General Assembly to condemn or disapprove after two formal reports, on the familiar doctrine of principal and agent, would amount to a confirmation."

These citations are peculiarly applicable to this case.

Upon the filing, in the Circuit Court of the United States for the District of South Carolina, by Thomas E. B. Pegues, a stockholder in the Cheraw and Darlington Railroad Company, in August, 1870, his Bill of Complaint against R. I. Humphreys, County Treasurer for Darlington, and John McCalla, County Treasurer for Chesterfield County, claiming that the property of the Cheraw and Darlington Railroad Company was, by its charter, exempt for taxation by the State, and praying an injunction against said tax officials, restraining them from enforcing their execution against the property of said company for taxes of the State and County, the Honorable D. H. Chamberlain, then the Attorney General of South Carolina, appeared for said tax officers in said suit, filed their joint and several answers, which pleading was signed by him as *"Attorney General of the State of South Carolina, for Defendants,"* and, himself, made affidavit of verification thereto (*Transcript, fols. 63 to 65*), and as Attorney General, contended for the right of the State to tax the property of said company. In these answers the Attorney General squarely met the issue tendered by the bill as to the exemption claimed, denying that a contract between the State and the Company has been violated by the assessment and taxation under existing laws, of the property of the said Cheraw and Darlington Railroad Company, and claiming for the State the right to repeal, modify or amend any previously existing exemption from taxation *"as inherent and inextinguishable in the legislative authority of the said State"* (*Transcript, fol. 64*).

Fom the Decree of the Circuit Court, sustaining the exemption claimed and granting a perpetual injunction, the Attorney General of South Carolina entered an appeal to the Supreme Court of the United States, July 10, 1871 (*Transcript, fol. 71*), and the case was afterwards argued by him in this Court (*16 Wallace, 246*), after he had ceased to be Attorney General, but on the special retainer and request of his successor in the office of Attorney General of the State, the Hon. Samuel W. Melton. See *"Annual Report of Attorney General to the General Assembly of the State of South Carolina," December*

1st, 1873 (*Transcript, fols. 42 to 45*), from which we make the following extracts:

"*During the year, several cases, involving issues of vast importance to the State have been heard in the Supreme Court of the United States, a report of which would doubtless be acceptable to the General Assembly. Before that tribunal, the Attorney General of the State is not required by law to appear, nor can he do so with due regard to other duties; and it has been the custom in such cases, where matters of the greatest moment to the State are finally determined, to retain counsel learned in the law and of experience in that Court. This I had not been authorized to do by the General Assembly, and no fund for that purpose had been placed at the disposal of my office, whilst the civil contingent fund, to which I had looked for the purpose, proved to be unavailable. In this contingency, my predecessor, Hon. D. H. Chamberlain, who had conducted the cases below, and was fully possessed of them, consented, upon my own solicitation and that of the Governor, to appear in behalf of the State, and, without the usual advantage of associate counsel in Washington, conducted the several arguments with eminent ability and success. I have respectfully to ask that the General Assembly will approve my action, and recognize these services by a suitable and adequate appropriation.* * * *" After reporting specially the result of two other cases, which had been argued in like manner, at the same term, viz: that of *Reuben Tomlinson et al. vs. Thomas Branch et al.*, which "involved the right of the State to tax the property of the *South Carolina Railroad Company*," in which the State gained a partial victory, and that of *Reuben Tomlinson et al. versus Morris K. Jessup et al.*, which involved the right of the State to tax the property of the *North Eastern Railroad Company*, in which the Court affirmed the right of the State to tax the property of the company, the report of the Attorney General continues thus:

"*R. I. Humphreys et al., appellants, vs. Thomas E. B. Pegues, appellee. The same questions, involving the right of the State to tax the property of the Cheraw and Darlington Railroad Company, were presented in this case, which was argued in the Supreme Court of the United States at the same time with the two cases last preceding. The decision of the Court holds that this company is exempt from taxation by the terms of the charter.*"

The record shows, that the report of the Attorney General was received as information, ordered to be entered in the Journal, and, on January 26, 1874, "referred to the Committee

on the Judiciary." The Transcript does not show what action was subsequently taken, if any, upon the report. There is, however, no evidence that the action of Attorney General Chamberlain, in appearing in the Circuit Court of the United States in the case of *Pegues vs. Humphreys et al.,* for the State, in submitting her rights to the jurisdiction of that Court, and in taking the appeal in her behalf, was ever repudiated by the State of South Carolina, or that the action of Attorney General Melton, in employing the Hon. D. H. Chamberlain *to appear for the State* in the Supreme Court and there to prosecute, on behalf of the State, her appeal in that case was ever disapproved or disaffirmed by the Legislature of South Carolina. The legal presumption is, that both were approved and confirmed, and the doctrine declared by the Supreme Court of South Carolina in the case of *State of South Carolina vs. Corbin & Stone, 16 S. C., 536,* cited above, is conclusive of all question as to the State having by her Attorney General come into the Courts and submitted her rights to their jurisdiction. *"Even if legislative authority was required,"* say that Court, speaking of the act of the Attorney General, *"the failure of the General Assembly to condemn or disapprove after two formal reports * * * would amount to a confirmation."*

The subsequent history of over thirty years' acquiescence by the State, in not repudiating the action of the Attorney Generals, in 1870-1871-1872, and in refraining from taxation of the property of the Cheraw and Darlington Railroad Company (*Transcript, fol. 78*), is additional proof of such confirmation by the State, if any were needed.

That it was the settled opinion of the people of South Carolina and of their representatives in the legislative, executive, and judicial departments of the State government, after 1873, that the property of the Cheraw and Darlington Railroad Company was exempt from taxation by the State, as declared by this Court in *Humphrey & Pegues,* and that the title of that property to such exemption remained undisputed after that date, and was never questioned, until the inventive genius of this suit discovered an imaginary flaw in that title, is further shown, by the affidavit of James Norton, who was, from 1891 to 1894, Chief Clerk in the office of the Comptroller General of the State of South Carolina, and afterwards himself the Comptroller General of the State. (*Transcript, fol. 46.*)

Mr. Norton swears, that during the years 1891-1894, while *"he was Chief Clerk in the office of Comptroller General and Clerk of the State Board of Railroad Assessors, * * * when other railroad companies filed returns of their property for tax-*

ation, the Cheraw and Darlington Railroad did not do so, and when the matter was called to the attention of the company, the representatives thereof claimed that its property was exempt from taxation, and that it had been so decided by the Supreme Court of the United States, the opinion of the Attorney General being given to said board in session, as a member and adviser thereof, and during the years that deponent was Chief Clerk as aforesaid, and during the years that deponent was Comptroller General of the State of South Carolina, no further attempt was made by the tax department of the State to tax the property of said company, and the exemption of same from taxation was acquiesced in by said department, upon the oral advice of each succeeding Attorney General to the respective succeeding Boards of Assessors."

Therefore, it is not true in law, that "a State is never bound by a judgment against its agents or officials," nor is it true, that "in a cause wherein it consents to submit its rights * * * such consent can only be given by the Legislature," that is, by a special Act or previous consent, as is asserted or intimated by appellants in their Fourth Assignment of Error (*Transcript, fol. 71*); such consent, at least, by law of South Carolina, and as far as that State is concerned, may be given without a special Act of the Legislature, and may be given by her Attorney General, by virtue of his office, under the general powers conferred on him by law, and as we have seen, such consent may be given or evidenced by subsequent ratification or acquiescence.

APPELLANTS' FIFTH ASSIGNMENT OF ERROR.

"V. *The Circuit Judge erred in holding that all questions as to claim of an exemption, whether raised and litigated or not in the former case, were concluded by the judgment therein; whereas, he should have held that only such questions as were actually raised and litigated in the former suit are concluded in a subsequent suit for taxes for subsequent years, the same constituting a new cause of action. (Transcript, fol. 115).*"

The Assignment of Error does not quote the language of the Circuit Judge correctly. He has not held "that all questions as to claim of an exemption, *whether raised or litigated or not* in the former case, were concluded by the judgment therein." What he did hold is this (Transcript, fol. 106): "*The Court finds, that the questions, whether the property of the Cheraw and Darlington Railroad Company in South Carolina is entitled in law to exemption by the State of South Carolina, by virtue of the grant contained in its amended charter, and whether the*

State would impair the obligation of its said contract by taxing said property, were finally determined by the Supreme Court of the United States on appeal taken in said cause, entitled Humphreys, Tax Collector, etc., et al. against Pegues, reported in 16 Wallace, U. S. Rep., 244, and that the issues therein determined are res judicata, and cannot be revived or their decision questioned in any other proceeding. * *"

In this ruling, the Circuit Judge committed no error, nor was he called upon to use the language, which the assignment prescribes for him, as the proper holding, on a point not necessary to his judgment or put in issue in the proceeding.

APPELLANTS' SIXTH ASSIGNMENT OF ERROR.

(Transcript, fol. 116.)

"VI. *The said Circuit Judge erred in not holding that the case presented by the State was on a new and different state of facts from the case of Pegues vs. Humphreys et al., and new questions were raised, and that the State was in no wise bound as to such new questions and causes of action, and such injunction against her attorneys was improperly granted, and bound the State contrary to, and in violation of the Statutes and Constitution of the United States.*"

In view of the judgment of this Court in *Humphreys vs. Pegues*, affirming the immunity of the property, which was of the Cheraw and Darlington Railroad Company, from all taxation by the State of South Carolina, and ordering execution of the Decree of the Circuit Court, perpetually enjoining the tax officers, who represent the State, it was wholly unnecessary for the Circuit Judge, when application was made to the Court to enforce said judgment against State officers of the present day, who were proceeding to enforce taxation on said property, to enter into the questions, whether the suit for the collection of State taxes instituted by said officers was a suit based "on a new and different state of facts from the case of *Pegues vs. Humphreys et al.*, or on new causes of action, or between othe parties, or whether new questions were raised * * *" as suggested in Appellants' Assignment of Error. It was enough for the Circuit Judge to know, as he did from appellants' own admission, that the suit begun by the Attorney General and his associates was brought in the name of the State under an Act of the Legislature, which sought to assess and impose taxes upon the property, which the Supreme Court of the United States had declared to be exempt, and it was enough for the Court also, and at the same time, to know, that the Act was

illegal and void, and could not give lawful authority to the Attorney General or to any other person, to bring suit for the collection of taxes purporting to be assessed on that property of The Cheraw and Darlington Railroad Company.

It was enough for the Court to know, that, whatever new or different state of facts from the case of *Pegues vs. Humphreys* might be alleged by the Attorney General and his confreres in their suit, and upon whatever new causes of action they might base their suit, and whatever difference, in the parties plaintiff and defendant, there may be, between the suit brought by the Attorney General, in the name of the State, against the Cheraw and Darlington Railroad and the appellee, as owner and in possession of the property, on the one hand, and the suit of *Pegues against Humphreys et al.*, on the other hand, and whatever new questions were or might be attempted to be raised, the essential facts were undisputed, viz: that it was a suit in the name of the State to tax property declared exempt, and was brought (necessarily) in violation of the law and the Constitution, in disregard or contempt of the decree of this Court and the decrees of the Circuit Court and in disobedience of the injunction which this Court has sustained in *Humphreys vs. Pegues*, and, therefore, the injunction was properly granted by the Circuit Court in this case—in execution of the Decree of Injunction in *Pegues vs. Humphreys et al.*

APPELLANTS' SEVENTH ASSIGNMENT OF ERROR.

"VII. *The said Circuit Judge erred in restraining the attorneys of the State from proceeding when no trespass upon or interference with the property of the petitioner was contemplated, and they were only proceeding in the Courts to settle the rights of the parties in a judicial manner without interfering with the property of the petitioner in any way.*" (Transcript, fol. 116.)

The gentle cooing of this assignment is remarkable, when it is remembered, that the objective point of the attorneys' suit was the recovery, against appellee, of a judgment for the sum of $29,877 57-100, for which appellee was to be amerced by the Court, to be followed by execution, and liens upon any property which The Atlantic Coast Line Railroad Company, defendant, might possess in the States of South Carolina, North Carolina, Virginia or elsewhere, and, possibly, by a sale at public auction of said property.

The Act of 1900 provided (Section 2), for an unlawful "*assessment*" (Section 3), for an unlawful charge, of "taxes,"

on said assessment, under a pretended levy, made retroactively and arbitrarily on the tax books of the State (Section 4), for an unlawful demand for said "taxes" (Section 5), that said "taxes" shall become due as soon as said demand is made, and if not paid in sixty days from the demands made, there may be an action brought, in the name of the State, by the Attorney General and such counsel as the Counties interested may employ, against the company, in default; and any company which may be in possession of the property which *has escaped taxation* * * *"

The grievous imputation of "default," as that of a "delinquent taxpayer," whose property is to be considered as having "escaped taxation," is here added to the wrong of a proposed unlawful confiscation, under forms of law, which was blazoned in the words of the Act; and, in the face of this projected outrage, his Honor, the Circuit Judge, is said by appellant to have erred in restraining the attorneys of the State from proceeding *"where no trespass or interference with the property of the petitioner was contemplated, and they were only proceeding in the Courts to settle the rights of the parties in a judicial manner, without interfering with the property of the petitioner in any way"!*

"To settle what rights of the parties," may we ask? Had not the rights of the parties been definitely settled by the judgment of this Court in 1873, and had not the State acquiesced in that *settlement* for over thirty years? Had not the State of South Carolina, for that whole period, recognized the right of the company under the Constitution of the United States to possess its property, and to use it and dispose of it, free from taxation? Had not the State, for that period and more, under advice of all her law officers and advisers, treated it as *non-taxable* property, by not even placing it on her tax book?

APPELLANTS' EIGHTH ASSIGNMENT OF ERROR.

"VIII. *The Circuit Judge erred in holding that the Supreme Court of the United States alone could open and modify the decree of Pegues vs. Humphreys, when it is respectfully submitted, that it was in no wise binding on the State and her attorneys, and that there is no method open by which the said question can be brought to a hearing except by appeal, and to enjoin the attorneys prevents that from being possible.*" (Transcript, fol. 116.)

This assignment assumes that there is some ground of law or fact for opening and modifying the decree of *Pegues vs.*

Humphrey. The conclusive presumption of the law is otherwise and always and universally prevails in favor of the justness and legal correctness of a final Decree of a Court of competent jurisdiction, affirmed by the appellate *forum*, and acquiesced in for a time sufficient to give to its decision the force and sanctity of a rule of property. *Vanfleet on Collateral Attack, par. 534, p. 7. Ibid., 553, p. 5.*

If, during all those thirty years, any legal foundation could have been discovered for a motion to open or modify such decree, such as either mistake of law or fact, or after discovered evidence, it would have been competent for the State of South Carolina by her Attorney General to have essayed such motion in this Court, or in the Circuit Court of the United States. Never would it have been legally permissible to attempt to impeach such decree or to avoid it, or deny its force, by a collateral attack in another and different cause, before another tribunal, or in another jurisdiction.

APPELLANTS' NINTH ASSIGNMENT OF ERROR.

"IX. *The Court erred in not holding that the admitted facts that the decree in Pegues vs. Humphrey was based on the assumption that there was a consideration for the alleged contract between the State and the Cheraw and Darlington Railroad Company, to wit: the building of the road subsequent to the Act of December 19th, 1863, and that that was untrue and no such consideration existed made an entirely new case, and that under this state of facts the exemption, if any was granted, was only a gratuity and could be revoked and had been repealed by the Constitution and laws of the State.*" (Transcript, fol. 116.)

It is not *"the admitted facts"* in this case, that the decree in *Pegues vs. Humphrey* "was based on the assumption," that the building of the Cheraw and Darlington Railroad Company was subsequent to the Act of December, 1863, nor was that decree, in point of law, "based upon" the consideration of the road being built subsequent to the Act of December 19, 1863.

Assuming, for the sake of argument, that such subsequent building was erroneously supposed by the Court to have been a fact, and to have entered into the consideration, or formed a part thereof, it did not constitute a material or essential part of the consideration of the contract, which was adjudged to exist, between the State of South Carolina and the Cheraw and Darlington Railroad Company, *by virtue of the amended charter*. The actual building of the road constituted a small

part of the consideration of the charter granted by the State. The principal "consideration of the contract" was the benefit to accrue to the public from the establishment and *continued maintenance* of a great highway of commerce and travel; and the equipping of the railroad *after* it was built, and the keeping it up and conducting it in the future, for the convenience and accommodation of the public, bore to the mere completion of its road bed, a vast disproportion in importance, in an estimate of the relative potency of the items of "consideration," which the State is presumed to have had in view in granting the exemption from taxation.

If it were a fact, that the road bed itself was actually completed and that the rails were laid and cars were run on the road before the exemption was granted, it is to be presumed that the Legislature in 1863 knew that such was the fact, and if, in the face of such known fact, the Legislature saw fit, in consideration of that fact, *and* of the subsequent equipment and future maintenance of the road, and the future conduct of its business as a highway for the public convenience and benefit, to grant the exemption, the "consideration" for the contract would be as complete as if the actual building of the road had been subsequent to the date of the grant.

The charter having been granted by the Legislature, the consideration for the grant is presumed, as matter of law, and it was not and is not an open question for the Courts to inquire into the elements, which may or may not have entered into such consideration in the minds of the legislative authority, or to base their judgment exclusively upon any one or more of such elements of the consideration of the charter granted. Upon this principle rests the rule, that it is never necessary for the Court to look into the consideration of a charter by a State or to require proof of such consideration.

In *Home of the Friendless vs. Rouse, 8 Wall, 430*, it was declared, *"There is no necessity of looking for the consideration of a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the Legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well settled doctrine of this Court on this subject since the case of Dartmouth College vs. Woodward. * * * And it is equally well settled, that the exemption is presumed to be of a sufficient consideration, and binds the State if the charter containing it is accepted" (New Jersey & Wilson, 7 Cranch, 164; Gordon vs. Appeal Tax Court, 3 How., 133; Piqua Bank vs. Knoop, 16 Ib., 369; Ohio*

Fund Co. vs. Debolt, 16 Id., 416; Dodge vs. Woolsey, 13 Id., 331; Mechanics & Traders Bank vs. Thomas, Id., 384; Mechanics & Traders Bank vs. Debolt, Ib., 380; Gee vs. Matthis, 4 Wallace, 143).

If it were a fact, that the road was built *before* the Act of the Legislature was paased, and if the decree of the Court had been based upon the assumption that the road had been built subsequent to the Act, the decree would nevertheless stand, upon the basis so adjudged, until the decree shall have been modified or reversed. This, according to the fixed rules of law, could only be accomplished by a motion, to correct the alleged mistake of fact, made in the cause, and in the Court, in which such decree has been rendered, in a direct proceeding expressly shaped to that end. Such a decree, even if based upon a mistake of fact, cannot be set aside or impugned upon evidence *dehors* the record of that cause, or indirectly, or by a proceeding in any other *forum* or cause.

*"For all the cases agree that a record of a domestic Court of general jurisdiction cannot be overturned in another action by matter dehors the record, and such an attempt, when the sole object is to declare the judgment void and not to get a review or new trial for newly discovered evidence, or to set it aside under the rules of equity, is always a collateral attack." Vanfleet on Collateral Attack, p. 5-34, p. 7. "A collateral attack on a judicial proceeding is an attempt to avoid it or to deny its force or effect in a manner not provided by law." Ib., 553, p. 5. "A late case in Oregon thus defines a collateral attack, 'an attempt to impeach a decree in a proceeding not instituted for the express purpose of annulling or correcting or modifying the decree or enjoining its execution,' Morrill vs. Morrill, 20 Or., 96, 12 Am. Eng. Encyl. of Law, 1441." * * * "As all judicial records must be tried by inspection, an attempt to overturn them by evidence dehors in a proceeding not provided by law, is a collateral attack." S. 3, p. 5. "The record of a Court can never be contradicted, varied or explained by evidence beyond or outside of the record itself. Any other rule would be disastrous in its results, * * * hence all records must be tried and construed by themselves."*

Appellee, however, is very far from admitting that either the decrees of the Circuit Court in *Pegues vs. Humphreys*, or the decision of this Court in *Humphreys et al. vs. Pegues*, *"was based upon"* the fact, that the Cheraw and Darlington Railroad was built subsequently to the Act of December 19th, 1863.

The record, we admit, does show that in the bill of complaint

of *Pegues,* filed in the Circuit Court, August 6, 1870, the following sentence occurs, to wit (Transcript, fol. 49):

*"That before the construction of said railroad under its charter by an Act of the General Assembly of South Carolina, passed the seventeenth day of December, in the year of our Lord one thousand eight hundred and sixty-three, Section 5 of the above first named Act was amended * * *."*

The bill goes on to state the purport of the amendment which contained the grant of the exemption from taxation, which the Court has since sustained as a contract binding upon the State.

The record also shows that the joint and several answer of the defendants, filed by the Attorney General, does not controvert the allegation of fact, that the Act of 1863 was passed "before the construction of said railroad under its charter." It is apparently ignored, whether intentionally, because it was thought to be a matter immaterial to the issue, or inadvertently, or by mistake, cannot now be known. The material averments of the bill were, however, fully answered and the substantial issues were met in the answer as follows, to wit (*Transcript, fol. 63*):

"XI. *These defendants, further answering, say, that it is true, as set forth in the bill of complaint, that the said Cheraw and Darlington Railroad Company is a body corporate by the laws of said State, doing business therein under a charter conferred by an Act of the General Assembly of the State, and the amendment thereto, and that the property of said corporation lying within the said State has been assessed for taxes in the manner set forth in the said bill of complaint, &c. * * *.*"

The answer, then, as we have stated, proceeds to meet the issues of law presented by the bill, claiming, among other defences, *"That no contract between the said Cheraw and Darlington Railroad Company and the said State has been violated by the assessment and taxation under existing laws of the property of said Cheraw and Darlington Railroad Company, &c. * * *."* (*Transcript, fol. 64.*)

Issue was joined upon the allegations of the bill, which had been controverted by the defendants, which issues were wholly matters of law, and there is no evidence in the record that the Circuit Judge "based" his decree in *Pegues vs. Humphreys* upon the allegation of the complaint, that the Act of 1863 was passed *before* the construction of said road under its charter, or that that allegation bore any weight in the conclusion which the Court reached upon the issues of law which were involved, and which constituted the real basis of the decree.

Subject to the reserved right to object to said "facts" being used as evidence, as not relevant or pertinent to the issues involved in the case, the attorneys on behalf of the petitioner and respondents in the case agreed to certain facts as admitted among them. "It is admitted, that the Cheraw and Darlington Railroad Company was organized and completed its road from Florence, S. C., to Cheraw, in December, 1855" (*Transcript, fol. 34*).

In making this admission, we do not for appellee admit, that the judgment of this Court on appeal in *Humphreys et al. vs. Pegues* was "based upon" the assumed fact that the road was built subsequent to the Act of 1863.

We contend, to the contrary, that the judgment of this Court affirmed the judgment of the Circuit Court, and was based upon the issues there presented, viz: the claim to the exemption, granted to the company, on the one side, and the denial of such exemption as a binding contract by the State, on the other.

It is also true that, in delivering the opinion of this Court in the case of *Humphreys vs. Pegues*, his Honor, Mr. Justice Hunt, says: "*The road was soon afterwards built,*" but he adds, "*and has since then been and now is in operation. These facts serve to show, first, that there was in this instance the consideration, that at any time exists for the granting by the Legislature of such privilege to aid the acceptance of the same, and the building of the road; and secondly, the intention of the Legislature by omitting a reference to the original Act of incorporation to grant all the powers and privileges that had been at any time conferred upon the North Eastern Company.*"

Clearly, all this is said by the distinguished Justice, *arguendo*, by way of illustration of the principle of such grants of exemption to railroad companies. He does *not* say, that the building of the road was the *sole* consideration for the contract by the State; or that it was ever necessary to show in grants by charter evidence of consideration, nor does he say, that the judgment of the Court is "based upon" that fact, as the appellants here contend. On the contrary, the sentences of the opinion by Mr. Justice Hunt, which precede, as well as those which follow the words quoted above, all show that the true basis of the judgment of the Court was the question, whether *by the terms of the Acts* of the Legislature, *upon the interpretation of which the case turned*, an exemption was granted, and if so, whether it was a contract between the State and the company, which by the law of South Carolina the State could not repeal.

The preceding sentences of the decree are as follows,

(p. 248): *"Whether it be said that the rights and privileges conferred upon the North Eastern, as they stood in 1863, existed in its charter or were derived from its incorporation, amounts to the same thing. We have no doubt that all of them were intended to be granted to the Cheraw Company by the Act of that year. The charter or incorporation, of 1851, had been amended in 1855, and by an Act, which purported in its title not to create an original authority, but by amending the original charter to bestow additional powers upon the company. After the passage of the amended Act, the North Eastern was, in law, as if it had originally been chartered with all the rights, powers and privileges conferred upon it by the Act of 1855. Such was the legal effect of the amendment; and such, no doubt, was the understanding of its effect by the Legislature of South Carolina when, in 1863, they conferred all its powers and privileges upon the Cheraw Company."*

These words embody the true "basis" of the decision of this Court. Mr. Justice Hunt then goes on, as follows:

"The case shows that from 1849 to 1863, no sufficient inducement had been formed to procure the building of the Cheraw road. We are not advised what other powers and privileges were then and there conferred upon it, in addition to the exemption we are considering. *But this exemption was conferred;* an exemption that must have been understood by the least reflecting person as being of immense value to all concerned in the road. The road was soon afterwards built, &c.," as quoted above.

Suppose, that some one had been at the elbow of the Justice, when he was writing his opinion, and, mistaking the true point of his discussion of the case, had, at this juncture, interposed, saying, "but, Mr. Justice, the road had already been built in 1863, when the grant was made," what would have been his reply? Would he have said, "That makes a wholly different case. I must bring my brethren of the Court together and call that fact to their attention, in order that they may change their decision?" On the contrary, would he not have instantly said, "That fact could make *no* difference in the result, nor change the conclusion of the Court, which rests on the words of the Act granting the exemption and the laws of South Carolina, which the Court has considered and interpreted." Might he not have added, "The equipment, or that portion of the equipment of the road, which was subsequent to the grant of the exemption in 1863, and the subsequent yearly maintenance of the road, and of its equipment, and the expense of running it, and the hourly benefit to the public, after 1863, as a public highway of

commerce and travel, were, far more than the mere building of the road, the inducement which presumably prevailed with the Legislature, and they constituted considerations amply sufficient to justify the Legislature in making the grant and amply sufficient to support the contract?" And might he not well have replied, still further, that "A charter from a Legislature of a State, when accepted, presumes a consideration; besides which, of the amount and sufficiency of the consideration for a charter or grant, the legislative department of the government is the exclusive judge, with whose province the Courts never interfere." *Home of the Friendless vs. Rouse, 8 Wallace, 430,* and cases cited *supra,* on page 24.

APPELLANTS' TENTH ASSIGNMENT OF ERROR.

"X. *The said Circuit Judge erred in not holding that the terms used in the Act of December, 1863, were not sufficient to confer an exemption from taxation on the Cheraw and Darlington Railroad Company, and that such was not conferred.*"

The complete answer to this assignment of error is, that this Court, in *Humphreys et al. vs. Pegues, 16 Wall, 244,* expressly decided, that the terms of the Act of 1863 were sufficient to confer an exemption from taxation on the Cheraw and Darlington Railroad Company, and that such exemption was conferred; and, as that decision has not been overruled or modified, the Circuit Judge correctly held that those questions are *res judicata.*

APPELLANTS' ELEVENTH ASSIGNMENT OF ERROR.

"XI. *The Court erred in not holding that there was plain and adequate remedy at law, and there was no particular ground for the interference of the Court of Equity.*" (Transcript, fol. 117.)

If this had been a case of a bill in equity, brought for the original purpose of enjoining a suit, the question might have been made as to whether the complainant in such bill had or had not a remeedy at law, but as this is simply a proceeding in execution of a decree in equity already rendered in an injunction suit, there is no place for such inquiry, and the suggestion, that the plaintiff in execution had a plain and adequate remedy at law, has no pertinence to the case, and comes entirely too late.

It would certainly be a most extraordinary proposition, that a Court of Equity, engaging in giving a party in interest the

benefit of a decree, long since rendered, and proceeding to execute such decree of injunction, may have its arm arrested, in the act of enforcing obedience to its judgment by a plea of "a plain and adequate remedy at law." No remedy at law could be as plain, or as adequate to the desired end, as the Court's own process of execution of its own decree.

APPELLANTS' TWELFTH ASSIGNMENT OF ERROR.

"XII. *The Court erred in enjoining the attorney of the State, for the reason that it thereby in effect enjoined the State of South Carolina from proceeding in her cause, making this in effect a suit against the State, and it was without power to hear and determine the same.*" (Transcript, fol. 117.)

A legal proceeding against persons, who are using their official character as State officers in acting or attempting to act in the name of the State, by bringing a suit, under the pretended authority of an Act of a Legislature, unconstitutional and void in its intent, cannot be held to be a suit against the State, in effect or in form. Such would be true, if this were an original bill in equity, seeking to enjoin the parties so claiming to represent the State from bringing their suit in the State Court. But, as we have seen, it is not even such a case, and on the contrary is simply an application to the Court seeking the benefit of a decree already rendered, and asking the Court to cause its own decree to be respected by executing the same, and is a proceeding *auxiliary* to such decree, and *ancillary* to the suit of *Pegues vs. Humphreys et al.*, in which said decree was rendered.

In the case of *Tindall vs. Wesley* (*167 U. S., 204*), *17 Sup. Court Ref., 77*, it was said:

"The cases in this Court in which it has been necessary to consider the meaning and scope of the Eleventh Amendment are quite numerous. In *Pennoyer vs. McConnaughty* (*140 U. S., 1 to 10*), *11 Sup. C. Rep., 701*, the opinion in which was delivered by Mr. Justice Lamar, the cases previously decided were examined and were held to belong to two classes. The first class, &c., * * * (citing *In re* Ayres, 123 U. S., 143, and others * * *)."

"The other class," the Court said, "*is where a suit is brought against defendants, who, claiming to act as officers of the State, and under color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff, acquired by it under a contract with the State. Such suit, whether brought to recover money or property in the hands of*

such defendants, unlawfully taken by them, in behalf of the State, or for compensation in damages, or in a proper case where the remedy at law is inadequate for injunction to prevent such wrong and injury, or, for a mandamus in a like case, to enforce upon the defendant the performance of a plain legal duty purely ministerial, is not, within the meaning of the Eleventh Amendment, an action against the State," citing Osborn vs. Bank, 9 Wheaton, 738; Davis vs. Gray, 16 Wallace, 400; Litchfield vs. Webster Co., 101 U. S., 773; Allen vs. R. R. Co., 114 U. S., 311, 5 Sup. C. Rep., 925-962; Board vs. McComb, 92 U. S., 531; Poindexter vs. Greenhow, 114 U. S., 270; 5 Sup. Ct., 903-962 * *.*

In re Ayres, 123 U. S., 443, on page 500 (lower half), it is said by this Court: "*In pursuance of the principles adjudged in the case of Osborn vs. Bank of United States (supra), it has been repeatedly and uniformly held by this Court that an injunction will lie to restrain the collection of taxes, sought to be collected by seizing of the property, imposed in the name of the State, but contrary to the Constitution of the United States, threatening the distraint complained of. The grounds of the jurisdiction in all such cases is that the defendants, though professing to act as officers of the State are threatening a violation of the personal property and rights of the complainant for which they are personally and individually liable. The principle was plainly stated in the opinion of the Court in Poindexter vs. Greenhow, 114 U. S., 270.*"

APPELLANTS' THIRTEENTH ASSIGNMENT OF ERROR.

"XIII. *The Court was without power to proceed against these appellants, for the reason that they were acting purely for and as agents of the State in whose behalf and interest the action sought to be stopped was being prosecuted, and the proceeding was in effect against the State, and could not be maintained without its consent.*" (Transcript, fol. 117.)

This assignment of error is little more than a repetition of the previous assignment (XII.), in our argument upon which we have met, by authority, the rather bold proposition that the Circuit Court, which is the custodian of its own decree, and of the mandate of this Court directing its execution, is "without power to proceed against appellants" in enforcing such execution of its decree; and "for the reason" that appellants were "acting purely for and as agents of the State of South Carolina * * *"

We have no hesitation in denying that appellants were or are "acting purely as agents of the State," in bringing a suit in the name of the State for the collection of "taxes" against the property which was of the Cheraw and Darlington Railroad Company, now in the possession and ownership of the appellee. The only warrant for such action on the part of the appellants, who claim to be officers of the State, is the Act of the Legislature, above quoted. This Act, as we have shown, is wholly unconstitutional and void, if applied to the Cheraw and Darlington Railroad or its property, in that it proposes to impose taxes on property, which this Court has decided to be exempt from taxation. This void statute could give no lawful authority to the respondents, the Attorney General or his associates, to use the name of the State as plaintiff, in such suit, or authority to them to act as agents of the State, or for her, or for her benefit. They, therefore, are not, and cannot claim to be, the agents of the State, or to be acting in her behalf, or in her interest, in bringing such suit for the collection of taxes against the appellee or against its property.

Where a Court, upon inspection of a given statute, invoked as authority for acts injurious to rights of person or property, finds that it violates the Constitution and impairs the obligation of a State's contract, and, as in this case, boldly defies the solemn judgment of this Court, declaring that certain property under such contract is exempt from taxation, the Court will not hesitate to declare such statute void and incapable of giving legal authority to any one. Again, the Court will not assume, that it was the deliberate purpose of the Legislature to violate the Constitution and the law as declared by the Court, or to act in contempt of its mandate, but will rather assume that the legislative body has been imposed upon by those who have successfully, but unworthily, engineered the unconstitutional statute through the processes of legislation.

The action sought to be stopped by this proceeding was, therefore, not being prosecuted by the State, nor by her authority, nor on her behalf, nor in her interest, nor by her authorized agents; and this proceeding, taken in execution of the decree of the Circuit Court and of the mandate of this Court, is not a proceeding against the State, and does not require her consent, but is a proceeding simply against persons who are attempting unlawfully to use the name of the State in imposing upon property, exempt from taxation, an unlawful assessment and taxation, and in attempting to collect such so-called "taxes." It will be noted, that the Act of Assembly, claimed by the respondents-appellants as their authority, does not name the

appellee, The Atlantic Coast Line Railroad Company, or the Cheraw and Darlington Railroad Company, and uses general terms in its title, and in its first Section, as if it was directed impartially against all railroads of the State of South Carolina, the title of the Act being *"An Act to provide for the assessment for taxation of railroad property which has been off the tax books for the years in which they have been off the books, and to fix the time when such taxes shall become due, and for the collection thereof;"* and the first section of said Act declaring as follows: *"Section 1. Be it enacted by the General Assembly of the State of South Carolina. That when railroad property has not been returned for taxation nor assessed for any year, and no taxes were paid thereon, and more than a year has elapsed since taxes for such years, if assessed at the proper time, would have been due, the said taxes shall be assessed by the railroad board of assessors, which shall be convened in extra session by the Secretary of State for such purpose, on the petition of any County Supervisor, in whose County any part of such railway may lie."*

There was nothing in the language of the title of the Act of 19th day of February, A. D. 1900, nor in its first Section, to indicate to the Legislature, to whom the Bill was presented for enactment, that the exempted property of the Cheraw and Darlington Railroad Company, or its successor in ownership and possession, The Atlantic Coast Line Railroad Company, was intended, or that it was the sole railroad property in South Carolina against which the provisions of the Act were aimed; and the evident purpose, by using the very general phraseology above quoted, to conceal from the view of the members of the General Assembly the fact, that the exempted property which was of The Cheraw and Darlington Railroad Company, was the single railroad property in the State contemplated by the authors of the legislation, is palpably apparent. It is very easy to see that by this unfair device, the eyes of the members of the General Assembly were blinded, and to comprehend that the Legislature, did not understand, that, in legislating for the retroactive imposition of assessment and taxation on railroad property generally which had been off the tax books, they were being entrapped into a violation of the Constitution, and into a defiance of the judgment of this Court, and were being made to attempt to impose taxation upon property exempt by law. It is not shown or suggested that any attempt has been made to apply said Act to any other railroad in the State, or to bring suit against any other railroad than the appellee for the collection of taxes, because of its property "having been off the

tax books," or "not returned nor assessed for any year, and no taxes were paid thereon;" and we have the testimony of ex-Comptroller General Norton (*Transcript, fol. 46*), that during the years 1890 to 1894, while he was Chief Clerk of the Comptroller General, and during the subsequent years, when he was the Comptroller General of the State of South Carolina, *all other railroads in the State filed returns of their property for taxation,* but that the Cheraw and Darlington Railroad Company did not do so, also that its claim of exemption from taxation was sustained by the then Attorney General of the State, and by the then railroad board of assessors, and *"that thereafter during the years that deponent was Chief Clerk as aforesaid, and during the years that deponent was Comptroller General of the State of South Carolina, no further attempt was made by the tax department of the State to tax the property of said company, and the exemption of same from taxation was acquiesced in by said department, upon the oral advice of each succeeding board of assessors."*

It is, therefore, impossible to escape the conclusion, from this state of facts, that the Legislature of 1900 was deceived and imposed upon by the authors of the Act; that the General Assembly of South Carolina never advisedly intended that said Act should apply to the property of the Cheraw and Darlington Railroad Company, which had never, since 1863, been on the tax books, and its property, therefore, could not be said "to be off the tax books," improperly or unlawfully, or be correctly described as having, thereby "escaped taxation" unlawfully.

The Court must, therefore, conclude, that the Act of February, 1900, has no application to the Cheraw and Darlington Railroad Company or to its exempted property found in the ownership and possession of the appellee, the Atlantic Coast Line Railroad Company; and, further, that said Act furnished no warrant of authority to the appellants for the suit for collection of taxes, which they have attempted to bring against appellee and against said property, and which suit has very properly been enjoined by the Circuit Court in this proceeding, as not a suit which can be lawfully prosecuted by the State or her officials.

APPELLANTS' FOURTEENTH ASSIGNMENT OF ERROR.

"XIV. *The Court erred in that it in effect has enjoined the State from prosecuting its action for taxes in its own name, which said Court has no power to do under the eleventh amendment to the Constitution of the United States and under the*

Revised Statute of the United States, Section 720." (Transcript, fol. 117.)

We have already fully shown that the Court has *not* "in effect enjoined the State," in enjoining the respondents-appellants; nor "enjoined the State from prosecuting its action for taxes, in its own name," by enjoining the action brought by the respondents-appellants, but has simply enjoined those who were attempting to abuse the State by using her name in a suit, which she could not herself lawfully prosecute, and which she has not authorized to be brought in her name. We have shown, that the State could not, in the face of the contract which this Court has held to be binding upon her, exempting the property of the Cheraw and Darlington Railroad Company from taxation, herself prosecute an action for taxes, and could not authorize any other person to prosecute such action in her name. We have also shown that the State has not authorized such action to be brought, and that the only authority which respondents-appellants claim for their attempt to prosecute against appellee an action in the name of the State for the collection of taxes, is an unconstitutional and void Act of the General Assembly, which gave no lawful authority to respondents, and was not the act of the State. From what we have shown, it appears, also, that the monies which the appellants were attempting, by a suit in the name of the State, to collect from the appellee were not "taxes" in any legal sense; were not "taxes," lawfully assessed or imposed under the Constitution of the State of South Carolina, or under the Constitution of the United States; but were so-called "taxes," illegally assessed, and unlawfully imposed, in violation of the Constitution of the United States.

APPELLANTS' FIFTEENTH ASSIGNMENT OF ERROR.

"XV. *The Court erred in that it held the State bound by a decree in Pegues vs. Humphreys et al., to which the State was not a party, and in which the Court would have been without jurisdiction, and the decree a nullity if the State had been a party.*" (Transcript, fol. 117.)

We have already met the position that the State was not a party in *Pegues vs. Humphreys* in considering appellants' "*Fourth Assignment of Error*," *supra*, and it would be only "to thrash over old straw" to follow appellants' reiteration of the same fallacy.

The assignment does not indicate how the Court would have

been without jurisdiction, or "the decree a nullity if the State had been a party." The authorities all show the contrary of such proposition.

APPELLANTS' SIXTEENTH ASSIGNMENT OF ERROR.

"XVI. *The Court violated Section 720, of the Revised Statute of the United States, prohibiting United States Courts from enjoining proceedings in State Courts, and it thereby erred.*" (Transcript, fol. 117.)

The authorities fully answer this assignment of error.

"*It is now thoroughly settled that the statute forbidding the Federal Courts to enjoin proceedings in a State Court, does not apply to proceedings incidental to jurisdiction properly acquired by a Federal Court for other purposes, than that of enjoining proceedings in a State Court. (Garner vs. Second Natl. Bk., 33 U. S. App., 91, 67 Fed. Rep., 833; Central Fruit Co. vs. St. Louis A. T. Ry. Co., 59 Fed. Rep., 385; Terre Haute & G. R. Co. vs. Peoria etc. R. R. Co., 82 Fed. Rep., 943.)* To these may be added (*Fisk vs. The Union Pacific R. R. Co., 10 Blatchford, 518; Wagner vs. Drake, 31 Fed. Rep., 849; Sharon vs. Terry, 36 Fed. Rep., 337; French vs. Hay, 22 Wall, 250; Deitzsch vs. Huidekoper, 103 U. S., 494*). See notes to Section 240 (720), *Desty's Federal Procedure* (9 Ed., p. 802)."

"* * * *its interpretation*" (that is, Section 720, U. S. Statutes), "*is restricted by Section six hundred and forty (640) and six hundred and fifty-six (656) of the Revised Statutes, to cases where the jurisdiction of the Courts of the United States is originally invoked for the purpose of staying proceedings in the State Courts (Perry vs. Sharpe, 8 Fed. Rep., 24).*"

"*A Court of the United States is not prevented from enforcing its own judgments by the statute, which forbids it to grant a writ of injunction to stay proceedings in a State Court.*" *Dietzsch vs. Huidekoper, 103 U. S., 494.*

That was a case,

"*Where a judgment by defendant in replevin was obtained in a State Court, after the case had been removed to the United States Court and judgment there entered, a suit was then begun in the State Court on the replevin bond. Thereupon Huidekoper and others filed a bill to restrain Dietzsch and others from proceeding with their suit in the State Court.*"

An injunction was ordered.

The Supreme Court, by Mr. Justice Woods, declared as follows:

"The suit upon the bond was, therefore, but an attempt to enforce a pretended judgment of the State Court, rendered in a case over which it had no jurisdiction, but which had been transferred to and decided by the United States Circuit Court by a judgment in favor of plaintiffs in replevin. The bill in this case was, therefore, ancillary to the replevin suit, and was in substance a proceeding in the Federal Court to enforce its own judgment by preventing the defeated party from wresting the replevied property from the plaintiffs in replevin, who by the judgment of the Court were entitled to it, or what was the same thing, preventing them from enforcing a bond for the return of the property to them.

*"A Court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State Court * * *.*

"As the bill in this case is filed for the purpose of giving to litigants on the law side of the Court the substantial fruits of a judgment rendered in their favor, it is merely auxiliary to a suit at law, and the Court had the right to enforce the judgment against the party defendant and those whom he represents, no matter how or when he may attempt to evade it, or escape its effect, unless by direct proceeding. These views are sustained by the case of French Trustee vs. Hay (22 Wall, 250), between which and this case there is no substantial difference."

In Davis vs. Gray, 16 Wall, 203, the doctrines of *Osborne vs. The Bank of the United States, were affirmed and the principles redeclared.*

*"That a Circuit Court of the United States, in a proper case, in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a Statute of the United States, when such execution will violate the rights of the complainant." * * * "Where a State submits itself without reservation to the jurisdiction of a Court in a particular case, that jurisdiction may be used to give full effect to what the State, by its submission, allowed to be done, and if the law permits coercion of public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose." Louisiana vs. Jumel, and Elliott vs. Watts, 107 U. S., 711.*

"Although the Circuit Court has no jurisdiction over the proceedings in a State Court, yet the Section does not prevent it from releasing a defendant from process of a State Court, violating its protection, or to prevent abuse of its privileges (Bridges vs. Sheldon, 18 Blatchf., 517; S. C., 7 Fed. Rep., 45, Hurst's Case, 4 Dall., 387)."

"So, a Circuit Court may restrain parties from taking out criminal process under a State law which impairs the obligations of contract (Louisiana State Lottery Co. vs. Fitzpatrick, 3 Woods, 222; Fed. Cases No. 8541)."

"A Federal Court may restrain proceedings on a suit in a State Court," the injunction being merely an ancillary proceeding, and not forbidden by the Section. (Sec. 720.) Kern vs. Huidekoper, 103 U. S., 485.

"Relief in equity has been granted where taxes are levied under a void law, contrary to the XIV. Amendment as against due process of law—Coulsor vs. Portland Deady, 481. Again, in a case of a tax upon property exempt from taxation." City National Bank of Paducah vs. Paducah, 2 Fillp, p. 61.

"Where an illegal tax upon personal property was imposed, the law imposing the tax being void, an injunction was issued." Union Pacific Co. vs. Ryan, 113 U. S., 516.

Relief by injunction where the tax upon property declared by the Supreme Court to be exempt. (See cases 22, Lawyers' Reports Annoted, p. 703. Notes at the bottom of right hand column.)

APPELLANTS' SEVENTEENTH ASSIGNMENT OF ERROR.

"XVII. *The Court erred in holding that the State can be bound by a decree against one of its tax officials, when it could not be bound by a decree against itself, unless by legislative action it submitted itself to the jurisdiction, and the said Court had no power to make such decree binding on the State, in this way, under the Constitution and laws of the United States.*"

Suffice to say, that the Circuit Court has not held, in language of the assignment, that "the State can be bound by a decree against one of its tax officials, when it could not be bound by a decree against itself." We have amply shown, above, that a State may be bound by a decree against one of its tax officials, where her rights have been, authoritatively, submitted to the jurisdiction of the Court (*supra, p. 37*); *Also*, that this may be done, without a special legislative Act. It is scarcely necessary to notice the suggestion, "that the said Court had no power to make such decree binding on the State, in this way, under the Constitution and laws of the United States." If by "said Court" is meant the Court from whose judgment this Appeal is taken, the answer is, that said Court has not made such decree, of 1870-1873, binding; such decree was binding by virtue of the authority of the United States

Circuit and of the Supreme Court, when the latter issued its *mandate* in 1873, and the Circuit Court, from whose order the Appeal is taken, simply executes the final decree of the Circuit Court, of 1871, of perpetual injunction, against attempts of the State of South Carolina, to tax the exempted property.

J. T. BARRON,
Counsel for Appellee.

With whom are THEODORE G. BARKER and P. A. WILLCOX.

OPINION

Supreme Court of the United States.

No. 88.—October Term, 1905.

U. X. Gunter, Jr., Attorney General of the State of South Carolina, et al., Appellants, vs. The Atlantic Coast Line Railroad Company.	Appeal from the Circuit Court of the United States for the District of South Carolina.

[January 15, 1906.]

Mr. Justice White delivered the opinion of the Court.

Before analyzing the facts particularly bearing upon the legal questions for decision, in order to a comprehension of those questions we summarize in their chronological order matters which are undisputed concerning the origin and development of this controversy.

The legislature of South Carolina in 1855 exempted the capital stock and property of the Northeastern Railroad Company from all taxation during its charter existence. In 1849 the Cheraw and Darlington Railroad Company was chartered by legislative act, and by an amendment to the charter, adopted in 1863, the last-named company was endowed with all the powers, rights and privileges granted by the charter of the Northeastern Railroad Company; it being besides provided that the charter should not be subject to the provisions of a general law, reserving the right to repeal, alter and amend, except where otherwise specially provided.

Under the assumed authority of a law of South Carolina, providing for the assessment and taxation of property, passed in 1868, (14 So. Car. Stat. pp. 27 to 69,) the Cheraw and Darlington Railroad was assessed in the counties of Darlington and Chesterfield, through which the road ran. It became the duty of the respective treasurers of the counties named to collect the State and county taxes on the assessment thus made, and they proceeded so to do. Thereupon, in 1870, Thomas E. B. Pegues, a citizen of Mississippi, a stockholder of the Cheraw and Darlington Railroad, filed his bill in the Circuit Court of the United States for the District of South Carolina against the Cheraw and Darlington Railroad Company and the treasurers of Darlington and Chesterfield counties, seeking to enjoin the corporation from paying and the county treasurers from collecting the taxes referred to. The ground stated for the relief prayed was that the taxes in question impaired the obligation of the charter contract of exemption, and were, therefore, repugnant to the Constitution of the United

States. Various provisions of a law of South Carolina, adopted in 1870, as an amendment to the act of 1868 under which the taxes were levied, restricting the right of the corporation to resist the collection of taxes, or to recover back an illegal tax, if paid, were alleged as justifying the interposition of a court of equity. An injunction *pendente lite* was allowed, restraining the collection of the disputed taxes. By its answer the corporation admitted the averments of the bill. A joint answer was filed for the two county treasurers, signed by "The Attorney General for the State of South Carolina, for defendants." This answer admitted the assessment, the steps taken to collect the taxes and asserted their validity, and denied the existence of the alleged contract of exemption. It was averred that if such an exemption ever existed it was subject to the legislative power to repeal, alter and amend, and such repeal was alleged to have been operated by constitutional and legislative provisions, which were referred to. Jurisdiction of the court, in equity, was challenged on the ground that there was an adequate remedy at law. A final decree passed in favor of the complainant, recognizing the alleged exemption and perpetuating the injunction. An appeal was prosecuted to this court. The cause was decided at the December term, 1872. It was held that there was a contract of exemption, which would be impaired by enforcing the taxes complained of, and hence the decree below was affirmed. (*Humphrey* v. *Pegues*, 16 Wall. 244.)

For at least twenty-five years following the decision in the Pegues case no attempt was made to tax the property of the Cheraw and Darlington Railroad Company. In the year 1897 an act was passed, directing the Attorney General to proceed to test the right of any railroad company to exemption, and under this act that official sued the Cheraw and Darlington Railroad Company to recover one hundred and thirty-four thousand dollars, the sum of taxes, penalties and interest for a period of twenty years, on the alleged ground that the company had been mistakenly treated as having a contract of exemption. The Supreme Court of the State, however, without passing upon the question of exemption, decided that the right to recover did not obtain, because in any event an assessment against the railroad as provided by law was a prerequisite to the levy and collection of taxes.

From a statement made in the argument of counsel it is to be deduced that during the year 1898 the capital stock and property of the Cheraw and Darlington Railroad Company was acquired by the Atlantic Coast Line Railroad Company of South Carolina, and as the result of a charter granted to that company by the State of South Carolina, in 1898, it is conceded that the property formerly belonging to the Cheraw and Darlington Railroad Company became taxable, and that the State has since that time levied and collected the taxes due on the property. It is, moreover, conceded that the appellee on this record, the Atlantic Coast Line Railroad

Company, a Virginia corporation, acquired, in 1900, the property of the Cheraw and Darlington Railroad Company, as the successor of the South Carolina corporation which bore the same name.

In the year 1900 an act was passed in South Carolina, providing for the assessment for taxation of railroad property "which has been off the tax books for the years in which they have been off the books, and to fix the time when such taxes shall become due and for the collection thereof." The act created a board to make the assessment to which it referred, limited the taxes to be imposed to ten years back, provided that the assessment made by the board should be put upon the rolls separately for each of the back years, and that there should be levied upon such assessment State and county taxes for the years to which the back assessment related. The act caused the taxes for which it provided to become a lien against the property upon which they might bear, and directed a certification of the taxes as assessed and levied to the respective county treasurers, and made it their duty to collect the same. To this end such treasurers were directed to make a demand for payment upon the company in whose name the assessment was made, or, if it was found that the property assessed was "in the control of another company, demand should be made of the company . . . in possession of the property." By the act, in addition, the Attorney General was directed, if the back taxes assessed were not paid within sixty days after demand, to bring a suit in the name of the State, with the co-operation of such counsel as the counties might employ, to enforce the collection of the back taxes against the company in whose name they were assessed or against the company found in possession of the property assessed.

A meeting of the board appointed by this act was called in May, 1900, by the Secretary of State, for the purpose of assessing the property formerly belonging to the Cheraw and Darlington Railroad Company, and in the control and possession of the Atlantic Coast Line Railroad for a period of ten years back from 1898, on the ground that during such period the property in question had not been taxed for State or county purposes. The Atlantic Coast Line Railroad Company appeared and protested against the proposed assessment. In the protest it directed the attention of the board to the exemption act, to the injunction granted and the decree rendered and affirmed by this court in the Pegues case. The board overruled the protest and valued the property of the Cheraw and Darlington Railroad Company for a period of ten years back from 1898 inclusive. The valuation so made was certified to the officials of the counties of Chesterfield, Darlington and Florence respectively, these three counties embracing the territory included in the counties of Chesterfield and Darlington at the time the decree was rendered in the Pegues case. The State and county taxes for the years covered by the assessments were placed upon the rolls, and

the taxes were certified for collection to the county treasurers. These officers demanded payment of the Atlantic Coast Line Railroad, as the company in possession and control of the property taxed. The company refusing to pay, the Attorney General of the State of South Carolina and counsel associated with him commenced, in the Common Pleas Court in the respective counties, actions in the name of the State to enforce payment against the Cheraw and Darlington Railroad Company and the Atlantic Coast Line Railroad Company, as the corporation in possession of the property. Thereupon the Atlantic Coast Line Railroad Company, alleging itself to be a citizen of Virginia, commenced, in the Circuit Court of the United States for the District of South Carolina, the proceeding which is now before us against the Attorney General of the State, the counsel associated with him in the suits above referred to, and the treasurers of Chesterfield, Darlington and Florence Counties. The petition which initiated the proceeding was filed as ancillary to the original Pegues case, and was entitled and numbered as of that cause. It referred to the prior proceedings in the cause, including the perpetual injunction therein issued, and to the decree of this court which affirmed the same. It alleged the assessment of back taxes as above stated, the asserted lien resulting therefrom, the demand of payment and the suits brought to enforce payment, and charged that each and all of the acts done concerning the said assessment of the back taxes, including the bringing of the actions in the State court, were in direct violation and disregard of the injunction previously issued. The prayer was that the petitioner as successor in interest of Pegues be protected in the rights and privileges adjudged in the Pegues case, and be accorded the benefit of the injunction issued in that case, and to that end that the Attorney General of the State and his associate counsel be enjoined from further prosecution of the actions commenced in the State courts in the name of the State to enforce payment of the taxes, and that the respective county treasurers be enjoined from any further attempt to collect such taxes.

A preliminary injunction was granted, restraining the Attorney General and his associate counsel from further prosecuting the actions brought in the State court, and also restraining the county treasurers from further proceeding to collect the taxes. In response to a rule to show cause why the preliminary injunction should not be made perpetual the defendants answered, denying the right to the relief prayed upon grounds which, as far as now material, we shall hereafter state and consider. After hearing on petition and answers, accompanied by affidavits or admissions establishing the facts to be as we have previously stated them, a final decree was entered, perpetuating the preliminary injunction. Subsequently the court, reciting that its attention had been directed to the fact that its decree was interpreted as restraining the prosecution of suits for any tax which might have accrued from the 18th day of July,

1898, when the exemption had been surrendered, modified its decree so as to exclude from the operation of the injunction any act of the defendants looking to the collection, "by suit or otherwise, of any sum or sums of money which may be due or charged for taxes on said property of the Cheraw and Darlington Railroad Company after said eighteenth day of July, 1898, at which date it was admitted in argument the exemption established in *Pegues* v. *Humphreys* was surrendered." This appeal was then taken.

Although the errors assigned on the record are seventeen in number, in the argument at bar but six contentions were relied upon, and we shall therefore confine ourselves to their consideration.

All the propositions involved in the assignments will be disposed of by determining first, whether all the defendants on this record, including the State through its Attorney General, were parties or privies to the decree in the Pegues case; second, if they were, whether the decree in that case concluded against them the want of power to impose or collect the taxes in controversy? and, third, if it did so conclude them, whether the court below erred in granting the relief which it awarded.

First. We at once treat as undoubted the right of the Atlantic Coast Line Railroad Company to the benefits of the decree in the Pegues case, since it is conceded in the argument at bar that that company, as the successor to the rights of Pegues, is entitled to the protection of the original decree rendered in his favor.

On the face of the record in the Pegues case, the nominal defendants were the treasurers of the counties of Chesterfield and Darlington, in which counties the property of the railroad was situated. Those now holding the office of treasurer in each of the named counties are among the parties on this record, with the addition of the treasurer of Florence County, which county, as we have stated, consists of territory embraced in Chesterfield or Darlington County at the time of the entry of the Pegues decree. That under these circumstances the defendant treasurers, as the successors in office of the officials who were parties to the Pegues case, are privies to that decree, is established. (*Prout* v. *Starr*, 188 U. S. 537, 544.)

In deciding whether the State and its Attorney General were privies to the Pegues decree, some elementary propositions must be borne in mind.

a. In view of the prohibitions of the Eleventh Amendment to the Constitution of the United States, a State, without its consent, may not be sued by an individual in a Circuit Court of the United States.

b. A suit against State officers to enjoin them from enforcing a tax alleged to be in violation of the Constitution of the United States is not a suit against a State within the prohibition of the Eleventh Amendment. The doctrine announced in many previous cases on the subject was stated by Mr. Justice Harlan, delivering the opinion of the court in *Smyth* v.

Ames, (169 U. S. 466,) wherein, after holding that a suit against officers to prevent the doing of acts authorized by a State statute was not necessarily a suit against the State, or within the prohibitions of the Eleventh Amendment, it was said (pp. 518–519):

"It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against a State within the meaning of that amendment."

And the subject was reviewed and restated in *Prout* v. *Starr*, (188 U. S. 537.)

c. Although a State may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment. (*Clark* v. *Barnard*, 108 U. S. 436, 447.)

As then the State was not a party *eo nomine* in the Pegues case and as although the suit was against officers, it was not for that reason alone a suit against the State, it must follow that the ascertainment of whether the State was a party to that cause depends upon determining whether the taxing officers who were the nominal defendants were endowed by the State with the power, in a suit brought against them assailing the validity of taxes levied, to represent the State in the controversy so as to conclusively establish the rights of the State against the plaintiff if decree passed against him, and on the other hand to establish as against the State the rights of the plaintiff in that cause if decree passed in his favor. Thus the inquiry reduces itself to this: Did the State of South Carolina become, in substance and effect, a party to the Pegues case? In other words, did the State, through the authority which it had conferred upon the defendant officers, voluntarily submit to judicial determination the question raised in the Pegues case concerning the alleged limitation of the taxing power of the State, arising from the contract on that subject which was asserted in that case?

As a prelude to the consideration of the question just stated, it is well to determine at once the interest which the State had in the controversy which was represented by the county treasurers who were the nominal defendants in the Pegues case. Coming to do so, it is plain that the controversy which that suit involved was one in which the State was directly interested, since the officers who were the nominal defendants were charged by the State law, not only with the duty of collecting the county but also the State taxes, the validity of which was assailed on grounds which challenged the power of the State to impose any tax upon the property of the corporation during the existence of its charter. The officers were,

therefore, in a sense, State officers, charged with the performance of a duty imposed for the benefit of the State. And that those officers were considered as being *pro hac vice* State officers, for the purposes of the controversy which the Pegues case involved, is shown by the statement of the case made by this court in delivering its opinion affirming the decree. Thus it was said (16 Wall. 245, 246):

"These different enactments above mentioned being in force, the State officers of counties in South Corolina, where the Cheraw and Darlington Railroad were situate, acting under the authority of the legislature of the State, imposed certain taxes on the stock and property of that company, and were proceeding to enforce payment of them, when one Pegues, a stockholder in Mississippi, filed a bill in the court below, praying an injunction to restrain the collection."

The question, then, is narrowed to this: Were the officers endowed with authority to stand in judgment for the State in suits brought against such officers wherein the validity of the taxes was assailed?

The law of South Carolina under which the taxes were levied was adopted in 1868. Now, by section 137 of that act, (14 So. Car. Stat. 65,) the county auditors and county treasurers were authorized to employ counsel, and the counties were made liable for the fees of such counsel as well as for any damages which might be awarded against such officials, resulting from a defense made by them of any action prosecuted against the officials "for performing or attempting to perform any duty enjoined upon them by this act, the result of which action will affect the interests of the county, if decided in favor of the plaintiff in such action." It follows from this provision that where a suit was brought against a county treasurer in respect to county taxes, that official was empowered to represent the county for the purpose of the defense of its interest, and a judgment rendered against such official was therefore made binding unpon the county. It was further provided in the section that "if the State be interested in the revenue in said action the county auditor shall immediately upon the commencement of said action, inform the auditor of State of its commencement, of the alleged cause thereof, and the auditor of State shall submit the same to the Attorney General, who shall defend said action for and on behalf of the State."

We see no escape from the conclusion that the provision last quoted where suit was brought concerning State taxes, made a county treasurer, who was the State tax collector, an agent for the State, and empowered him, "for and on behalf of the State," to defend the suit, and required him, in order fully to protect the interests of the State, to be represented by the highest law officer of the State, the Attorney General. And the power which we think the section referred to conferred upon the county officers to represent the State in suits or actions is moreover persuasively indicated by a

consideration of the act of 1870, amending in certain particulars the act of 1868. (14 So. Car. Stat. 366.) Substantially, that amendment, whilst forbidding the taxpayer from enjoining the collection of taxes, created a remedial system, by which questions of asserted illegality were to be examined by the State auditor, and, where that official disallowed the claim of illegality, made it the duty of the taxpayer to pay, and, subject to certain conditions, gave a right of action to recover back the money paid. And by section 8, where such an action was brought, it was made "the duty of the Attorney General of the State to defend any suit or proceedings against any tax collector or other officer who shall be sued for moneys collected, or property levied on, or sold on account of any tax, when the State auditor shall have ordered such collector to proceed in the collection of any such tax, . . . and any judgment against such collector or officer finally recovered shall be paid in the manner provided in section 81 of the act to provide for the assessment and taxation of the property aforesaid"—that is, section 81 of the act of 1868. Now, by that section, where a judgment passed against a county official concerning State taxes which had been paid, the State was in effect made liable for the amount of the judgment. Thus, in such a case, as in cases provided for in section 137 of the act of 1868, the State through its officials was made the real defendant.

If there were doubt—which we think there is not—as to the construction which we give to the act of 1868, that doubt is entirely dispelled by a consideration of the contemporaneous interpretation given to the act by the officials charged with its execution, by the view which this court took as to the real party in interest on the record in the Pegues case, and by the action as well as non-action which followed the decision of that case by the State government in all its departments through a long period of years.

The answer in the Pegues case, which denied the existence of the alleged contract of exemption and asserted the existing and continuing power of the State to tax, was signed, for the defendants, by the Attorney General of South Carolina, who also, in his official capacity, verified such pleading. The word "defendants" cannot be construed as implying any other than the county officers empowered to represent the State, without imputing to the Attorney General a failure to discharge the duty directly imposed upon him by the State. This must result from the command of the statute, that he should defend the suit, the State revenue being concerned, not merely for the county officers, but "for and on behalf of the State," a command which would have been wholly disregarded if the appearance of the Attorney General be treated as having been made solely for the purpose of representing the defendants as individuals. And subsequent events show that the highest law officer of the State, when he filed the answer for the defendants in the Pegues case, intended that answer to be

what the statute caused it to be, that is, an answer for the defendants standing upon the record, for and in behalf of the State, in defense of the right of the State to collect the taxes. When the appeal was prosecuted from the final decree perpetually enjoining the officials who were named as the defendants (and, as we have seen, their successors in office) from any attempt in the future to collect a tax upon the property of the Cheraw and Darlington Railroad Company, such appeal was prayed by the same counsel who had signed the answer as Attorney General of the State, and who, upon the expiration of his term of office, was retained by his successor in office and the Governor of the State (as shown by an official report made to the legislature of the State) to prosecute the appeal and "to appear in behalf of the State." And when the appeal was heard in this court a printed argument was signed, not only by the counsel thus retained on behalf of the State by the Governor and the Attorney General, but also by the then incumbent of the office of Attorney General of the State. That this court, in deciding the appeal in the Pegues case, considered that the State was the real party appellant, is shown by the opinion, where it was said (p. 247):

"The State contends that the privileges thus granted were limited to those conferred upon the Northeastern by its original charter or act of incorporation passed in 1851."

When to all these conclusive considerations there is added the fact that we have not been referred to any legislative action repudiating the conduct of the Governor and the Attorney General in the defense of the Pegues suit for and on behalf of the State, and when besides we take into account the failure of the State government in all its departments, for more than twenty-five years following the decision of the Pegues case, to assert any right to tax in conflict with the contract exemption which the Pegues decree sustained, the binding efficacy of the decree in that case upon the State of South Carolina seems to us beyond the reach of serious controversy. Indeed, we are not left to conjecture that the inaction of the State was the result of what was deemed to be the conclusive effect on the State of the Pegues decree, since it is shown that in one or two instances after that decree was rendered where preliminary steps were taken by the taxing officials of the State to impose taxes on the property of the railroad, such efforts were at once abandoned in consequence of the advice of Attorneys General of the State that the decree in the Pegues case was conclusive and the property could not be taxed.

Concluding, as we do from the terms of the act of 1868, that the officers who were named as defendants in the Pegues case were, for the purpose of that litigation, the agents voluntarily appointed by the State to defend its rights and submit them to judicial determination, we content ourselves with saying that it is unnecessary to review the case of *Corbin* v. *Stone*,

(16 So. Car. 533,) and other decisions of the Supreme Court of South Carolina, pressed upon our attention, since those cases did not involve the statute of 1868 or statutes of like import. And, moreover, we must not be understood as holding that other provisions of the law of South Carolina, relied upon in argument, would be inadequate to bind the State by the action of its Attorney General, if the provisions of the act of 1868 did not exist. Into that consideration we have not entered.

Second. The State of South Carolina and its Attorney General, and his associate counsel, as the agents of the State, being, therefore, privies to and bound by the decree in the Pegues case, we must determine what was concluded by that decree. That the issue in the case was the existence of a charter exemption from taxation in favor of the Cheraw and Darlington Railroad Company, and the consequent want of power of the State to tax the property of the railroad during the continuance of the exemption, is obvious. And that the decree rendered in the cause established the exemption embraced in the issues is also obvious. This being true, it unquestionably follows that the decree established as to the parties and their privies the very question in issue in this proceeding. Escape from this inevitable result is sought to be accomplished by several propositions, all of which we think are unsound.

a. The complaint in the Pegues case, it is said, mistakenly averred that the Cheraw and Darlington Railroad had not been built at the time the amendment of the charter was made which gave the exemption relied upon, and as this, it is asserted, was not traversed by the answer filed in the case by the Attorney General it was consequently erroneously assumed to be true in fact, and the decree, it is argued, was based upon such assumption. From this the contention is that if the truth had been established a different decree would have been rendered, because no consideration for the grant of exemption would then have appeared. But, even granting the premise, the deduction is unsound. To admit it would destroy the effect of the thing adjudged, resulting from the decree in the Pegues case, since all defenses then existing to the asserted right of exemption, whether brought to the attention of the court or waived, were foreclosed by the decree. (*United States* v. *California & Oregon Land Co.*, 192 U. S. 355; *Fayerweather* v. *Ritch*, 195 U. S. 276, 300 *et seq.*, and cases cited.) And although it be conceded for the sake of argument that the doctrine of *res judicata*, as announced in rulings of the Supreme Court of South Carolina, lend support to the contention made, our duty is to give to the decree of the Circuit Court of the United States in the Pegues case the force and effect to which it is entitled under the principles of *res judicata* as settled by this court, especially in view of the fact that the controversy in the Pegues case involved rights protected by the Constitution of the United States. (*Deposit Bank* v. *Frankfort*, 191 U. S. 499.)

b. It is urged that as the taxes, the collection of which the court enjoined, were not for the same years as were the taxes with which the Pegues case was concerned, the Pegues decree was, therefore, not *res judicata*, because it related to a different cause of action. This rests upon the assumption that a decree enjoining the collection of a tax for one year can never be the thing adjudged as to the right to collect taxes of a subsequent year. But the proposition entirely disregards the fact that the decree in the Pegues case, enjoining the collection of the taxes in controversy in that case, was rested upon the ground that there was a contract protected from impairment by the Constitution of the United States which was as controlling on future taxes as it was upon the particular taxes to which the Pegues suit related. The contentention, therefore, simply asserts that a contract right of exemption was beyond the pale of judicial protection, because rights under such contract could never be sanctioned by final judicial action. Besides, the proposition is not open to controversy. (*New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Deposit Bank* v. *Frankfort*, *supra.*)

Third. It is insisted that the court below had no power to restrain the Attorney General of South Carolina and the counsel associated with him from prosecuting in the State courts actions authorized by the laws of the State, and hence that the court erred in awarding an injunction against said officers. Support for the proposition is rested upon the terms of the Eleventh Amendment and the provisions of section 720 of the Revised Statutes, forbidding the granting of a writ by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. The soundness of the doctrine relied upon is undoubted. (*In re Ayres*, 123 U. S. 443; *Fitts* v. *McGhee*, 172 U. S. 516.) The difficulty is that the doctrine is inapplicable to this case. Section 720 of the Revised Statues was originally adopted in 1793, whilst the Eleventh Amendment was in process of formation in Congress for submission to the States, and long, therefore, before the ratification of that amendment. The restrictions embodied in the section were, therefore, but a partial accomplishment of the more comprehensive result effectuated by the prohibitions of the Eleventh Amendment. Both the statute and the amendment relate to the power of courts of the United States to deal, against the will and consent of a State, with controversies between it and individuals. None of the prohibitions, therefore, of the amendment or of the statute relate to the power of a Federal court to administer relief in causes where jurisdiction as to a State and its officers has been acquired as a result of the voluntary action of the State in submitting its rights to judicial determination. To confound the two classes of cases is but to overlook the distinction which exists between the power of a court to deal with a subject over which it has jurisdiction and its want of authority to entertain a contro-

versy as to which jurisdiction is not possessed. From this it follows that, as in the Pegues case, the court had acquired jurisdiction with the assent of the State of South Carolina, to determine as to it the controversy presented in that case, the right of the court to administer relief, to make its decree effective, cannot be measured by constitutional or statutory provisions relating to original proceedings where jurisdiction over the controversy did not obtain. In other words, the proposition relied upon is disposed of by the conclusion which we have previously expressed concerning the persons who were parties and privies to the decree rendered in the Pegues case. Indeed, the proposition that the Eleventh Amendment, or section 720 of the Revised Statutes, control a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion. (*Dietzsch* v. *Huidekoper*, 103 U. S. 494; *Prout* v. *Starr*, 188 U. S 537; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112.)

And this reasoning disposes of the contention that the court below erred in enforcing its prior decree because there was adequate remedy at law, by interposing a defense in the State courts to the actions brought by the Attorney General. That question was foreclosed by the decree in the Pegues case. So also does the reasoning dispose of the assertion that because a part of the tax for the year 1898 may have been due, therefore tender should have been made before invoking the power of the court to protect its jurisdiction and enforce the prior decree. The amendment of the decree made by the court eliminated from the controversy all question concerning the portion of the tax not covered by the decree in the Pegues case. Having acquired by that decree a right which the petitioner was entitled to enforce, whatever might have been the rule of tender as applied to other cases, that rule could not rightly be invoked to deprive the court below as a court of equity of the power to protect the petitioner in the enjoyment of rights previously secured under a decree of the court.

Affirmed.

Mr. Justice BROWN dissents.

True copy.

Test:

Clerk Supreme Court, U. S.